Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEV_VAL *v.* UNITED STATES

PETITION FOR REVIEW TO THE UNITED STATES GOVERNMENT

No. 13–01. Argued July 29, 2021—Decided August 7, 2022

Petitioner was removed from his position as President pro tempore of the United States Senate by a vote of the United States Senate. The President of the United States, under Art. I, sec. 3, cl. 2 of the United States Constitution, made a series of appointments to fill the vacancies in the United States Senate. This presidentially made Senate ultimately removed the Honorable Dev_Val from his capacity as President pro tempore. Petitioner now raises the question of whether the Senate was appropriately and correctly sworn into office.

Held: The Constitution does permit the President of the United States to appoint individuals to vacant seats in the United States Senate according to Art. I, sec. 3, cl. 2 which says, "[i]f Vacancies happen [in the Senate] by Resignation or otherwise, the Executive of the United States may make temporary Appointments until the terms of those vacant seats filled [ultimately] expire." Pp. 3.

(a) The Court is unable to provide a specific answer on the second and third questions under the separation of powers doctrine. It is the role of the legislative branch to answer those questions, not this Court. Pp. 5–9.

(b) There is no legally binding document of any sort that requires oaths to be documented at the present day. Congress or the National Archives and Records Administration can ultimately make that determination.

BUTLER, J., delivered the opinion of the unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 13–01

DEV_VAL, PETITIONERS *v.* UNITED STATES

ON PETITION FOR ANYTIME REVIEW

[August 7, 2022]

JUSTICE BUTLER delivered the opinion of the Court.

Typically, I am in favor of petitioners before this Court; they often bring to us a legal argument that "I cannot think of a good reason to say no" to, *Marcus Deshaw Hicks* v. *United States*, 582 U. S. ___ (2017) (Gorsuch, J., concurring). In this case, I can think of every reason to disagree with the petitioners. To the petitioner's very first question of whether the President of the United States can appoint individuals to the United States Senate, the answer: yes, the President can. Art. I, sec. 3, cl. 2 says, "[i]f Vacancies happen [in the Senate] by Resignation or otherwise, the Executive of the United States may make temporary Appointments until the terms of those vacant seats filled [ultimately] expire." This is the easy part of the case. Yes, the President can, according to this very plainly written sentence in our Constitution, fill vacancies in the United States Senate. The trickier parts of this case come from questions two and three. Question two asks us if administering the oath of office to an individual needs to be recognized by someone. Question three asks us if oaths of office require documenting.

I

The petitioner attempts to place our ability to hear this case under *Ryder* v. *United States*, 515 U. S. 177 (1995). In

that case, we held that a challenge regarding the appointment of an Officer of the United States is entitled a decision by our Court's pen under the Appointments Clause of the United States Constitution. I disagree with this move completely. Officers do not include members of the legislative branch. They are only pertaining to members of the executive and judiciary. Specifically, "[a]mbassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, sec. 2, cl. 2. of the United States Constitution. The reason that members of the legislative are not included in this list is because they handle the giving of "Advice and Consent." *Ibid*. At least, the United States Senate wields that duty. *Ibid*. However, it implies that if our Senators are not included under the notion of what an Officer of the United States, then how would the House of Representatives be any different? Instead, I would adopt the idea of defining an "Officer of the United States" as a position to which is delegated by legal authority a portion of the sovereign power of the federal government and that is 'continuing' in a federal office subject to the Constitution's Appointment Clause. A person who would hold such a position must be properly made an 'officer of the United States' by being appointed pursuant to the procedures specified in the Appointments Clause.

For example, the President of the United States has the power to "grant reprieves and pardons for offenses against the United States." Art. II, sec. 2. of the United States Constitution. This power is delegated to the United States Pardon Attorney, who is housed in the United States Department of Justice, to receive pardon applications and advise the President of the United States as to who should receive

a presidential pardon.

Our Constitution is quite quiet on oaths of office quite frankly. The word "oath" itself is only mentioned five times in the Constitution. However, the petitioner blatantly ignored the statutory relevance in this matter. Section 2903, title 5, United States Code details in all of three sections—a, b, and c—who has the authority to administer the oath of office in particular circumstances. If we adopt the requests that the petitioner would like us to make, then we would be embracing a fine line that causes us to go against the Constitution's clear rule: there must remain a separation of powers.

II

We are, though, quite satisfied to say that governmental powers are separate and shared, departments distinct and overlapping, functions autonomous and interdependent. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) ("The Constitution 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity." (Jackson, J., concurring). It is oft-repeated. See, *e.g.*, *Mistretta* v. *Olson*, 487 U. S. 654, 694 (1998) (both quoting Justice Jackson's statement in *Youngstown*).

A not "entirely separate," see *Mistretta*, 488 U. S. 380 (citing *Nixon* v. *Administrator of Gen. Servs.*, 433 U. S. 425, 443 (1977)), but "entirely free," see *id.* (quoting *Humphrey's Ex'r* v. *United States*, 295 U. S. 602, 629 (1935))—set of departments is the only way we can think about the separation of powers anymore. Indeed, yes, we, the Supreme Court of the United States, have managed to convince ourselves that these "cancelling quotations" best describe historical understandings. Justice Jackson's statement in *Youngstown* says, "[a] century and half of partisan debate and scholarly speculation" about the separation of powers has yielded no net result other than "apt quotations" that "largely cancel each other." *Youngstown*, 343 U. S. at 634-

35 (Jackson, J., concurring). To which, we said in *Mistretta*, 488 U. S. at 380 (attributing to the Framers and specifically James Madison, the idea that each of the three branches need not be "entirely separate and distinct" but remain "entirely free from the control or coercive influence" of the others."); see also *Humphrey's Ex'r*, 295 U. S. at 629).

We live in a world in which the very "tyranny" Madison decries has become banal: Daily, the departments each perform legislative, executive, and judicial functions without inspiring the slightest public outcry against "tyranny." "[O]ur formal, three-branch theory of government—at least as traditionally expressed—cannot describe the government we long have had…"). Indeed, we have known this for some time. See *Myers* v. *United States*, 272 U. S. 52, 291 (Brandeis, J., dissenting) (stating that the Constitution "left to each [branch] power to exercise, in some respect, functions in their nature executive, legislative, and judicial"). Every time we use the term "separation of powers," we invoke a common, yet tacit, narrative of power—a narrative construction upon the legal authority: We imagine the executive, judicial, and legislative powers divided and neatly arranged among the departments. This is done so through the first three Articles of the United States Constitution.

In the past few decades, none of our more significant opinions on the separation of powers has failed to enlist Madison or Madison's *Federalist* in the contemporary battle for separation of powers. See, *e.g.*, *Plaut* v. *Spendthrift Farm*, *Inc.*, 115 S. Ct. 1447, 1454 (1995); *Mistretta* v. *United States*, 488 U. S. 361, 380, 381, 382, 394, 409, 426 (1989); *Morrison* v. *Olson*, 487 U. S. 654, 697-99, 704-05, 726 (1988) (Scalia, J., dissenting); *Bowsher* v. *Synar*, 478 U. S. 714, 721-22 (1986); *Comadity Futures Trading Comm'n* v. *Sclior*, 478 U. S. 833, 860 (1986) (Brennan, J., dissenting) (all citing Madison or Madison's *Federalist Papers* essays to support the separation of powers arguments).

In fact, a variety of important structural programs ensure

the independence of those who hold government power. To which, it is widely accepted today that we have lost a coherent, theoretical vision of the separation of powers and that in the distance between Madison's time and our own—any real understanding of the need or importance of this doctrine has been squandered. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 634, 634-65 (1952) (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for the Pharaoh.").

At present, much of the debate about the separation of powers rests on the assumption that the proper questions to ask are questions about the allocations of legal authority: "Is this power properly located in the judiciary department"? or "Is that power permissible for an administrative"? See *Mistretta* v. *United States*, 488 U. S. 361 (1989) (addressing the question whether the Sentencing Commission is properly located in the judiciary department); see also *Morrison* v. *Olson*, 487 U. S. 654 (1988) (addressing the question whether the independent counsel may exercise "executive" powers).

Of course, the "independence" that Madison admired was only partially fulfilled in the Constitution. For example, Madison saw the Senate's role in appointing executive branch officers as an "exception" to be narrowly construed. See *12 Papers of Madison*, *supra*, note at 153, at 233 (noting this "exception"). This relates to the idea of "checks and balances" – which sums up our most common ideal of separation of powers. Not surprisingly, it has come to be associated with Madison's *Federalist* essays on the separation of powers. See *Furman* v. *Georgia*, 408 U. S. 238, 470 (1972) (Rehnquist, J., dissenting) (quoting *Federalist* No. 51 to clarify the purposes behind the systems of checks and bal-

ances). For example, when checks and balances are in motion, the President has often concurred in legislative proposals that are later found to violate the separation of powers. See, *e.g.*, *Bowsher* v. *Synar*, 478 U. S. 714, 721-34 (1986) (striking down the Gramm-Rudman Hollings Budget Act as a violation of the separation of powers.); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Lime Co.*, 458 U. S. 50 (1982) (plurality opinion) (striking down Congress' creation of non-Article III bankruptcy judges as violating the separation of powers); *Buckley* v. *Valeo*, 424 U. S. 1, 109-43 (1976) (*per curiam*) (striking down the Federal Election Campaign Act of 1971 as violating the separation of powers). Similarly, presidents often sign legislation while voicing misgivings about its constitutionality.

In that, we only speak contradiction when we embrace a discourse of separated, but shared, powers if we think that what we are separating, or sharing is the same undifferentiated entity called "power." We only believe that we must choose between a system of separated and what is being separated and what is being shared or checked is the same thing called "power." We only believe that we must describe otherwise conflicting views as "flexible" if we believe that what is being shared and separated leads to conflict because we are sharing and separating the same thing. *Mistretta* v. *United States*, 488 U. S. 361, 381 (1989) (using the term "flexible" to describe a system of separated and shared powers). Originalists routinely cite Madison as a disciplinarian of the separation of powers who cautioned us about the importance of maintaining departmental integrity. *Morrison* v. *Olson*, 487 U. S. 654, 697-99 (Scalia, J., dissenting) (citing Madison as a proponent of strict separationism). Moreover, functional analysis conducts a similar intellectual exercise, but proceeds in reverse: It asks whether the challenged action interferes with a "core function" or the successful performance of an essential function of an existing department. See *Mistretta* v. *United States*, 488 U. S. 361, 384, 382-84

(1989) (apply a functional approach in upholding the Sentencing Reform Act of 1984); see also *Morrison* v. *Olson*, 487 U. S. 654, 677-85 (1988) (applying a functional approach in upholding the Ethics in Government Act of 1978). Hypothetically, if a structural innovation permits members of one department to manipulate members of another department, the innovation may be dangerous to structure whether or not it interferes with a core function or violates an ideal of functional purity.

When a formalist reaches for purity, they reach for purity based on functional description—a conceptual process that hardly leads to formal, in the sense of determinate results. See *Bowsher*, 478 U. S. at 749 (Stevens, J., concurring) ("[G]overnment powers cannot always be readily characterized with only one of . . . three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."). At the same time, when functionalists reach to protect the "core" of a department, they depend at least in part upon an ideal of separation that seems distinctly formal—a separation that depends upon three distinct descriptions. Both share an assumption similar to the one originalists tend to make: That the separation of powers is the separation of legal power (generalized as "function"). Neither the formalist or originalist approaches, respectively, consider that what they are separating may be different in kind.

It is not the role of the judiciary in this matter to write the law in some way for this. Our job is to interpret it, not write it.

III

The reason I say all of this in the second section is because the petitioner is asking us to rewrite the law in his favor to ultimately throw out a process that has worked for quite some time. Our statutes have made it clear how oaths

of office shall work, our Constitution does the same. It is not the place of this Court to write the law, only to interpret it. The petitioner ought to take his issues to the legislative branch.

* * *

"Throwing out precedence when it has worked and is continuing to work, to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby County* v. *Holder*, 570 U. S. 529 (2013) (Ginsburg, J., dissenting). This Court has very strict boundaries. We cannot throw ingredients into a witch's pot, stir it around, and pray that some answer brews itself. The Supreme Court of the United States is not a place to conjure legal answers to questions when specific areas of law have given nothing on the matter. We do not entertain questions with no foundation in the legal realm.

It is so ordered.